

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION**

MARVIN LEE KIRK,	:	
	:	
Petitioner,	:	5:04CV182 (DF)
	:	
vs.	:	5:01CR94 (DF)
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

ORDER

Petitioner Marvin Lee Kirk's appeal was remanded to this Court by the United States Court of Appeals for the Eleventh Circuit on September 9, 2005 (tab 67). The Eleventh Circuit directed this Court to make a factual determination regarding the date on which Kirk's notice of appeal was filed for purposes of Rule 4 of the Federal Rules of Appellate Procedure.

Because the judgment from which Kirk is appealing was entered on June 2, 2005, and because the United States is a party to this action, Kirk had until August 1, 2005 (60 days) to file his notice of appeal. *See* Fed. R. App. P. 4(a)(1)(B) (West 2005). As a prisoner, Kirk is entitled to avail himself of the prison mailbox rule, under which his notice of appeal is deemed filed when it is delivered to the appropriate prison officials for mailing, not when it is received by the Office of the Clerk of Court. *See Houston v. Lack*, 487 U.S. 266, 271-72 (1988). Kirk's notice of appeal was received in the clerk's office on August 12, 2005.

The Court held a telephone conference call with Kirk and Assistant U.S. Attorney Dean Daskal on September 21 to discover the facts necessary to support the determination requested on remand. The Court learned that the Government received a service copy of Kirk's notice of appeal on July 25. The service copy was postmarked July 20. Kirk represented that he delivered both the original notice (which was mailed to the clerk's office) and the service copy to prison officials at the same time, but that the original was returned to the prison for insufficient postage. Additional postage was then affixed to the original and it was delivered to prison officials—and thus deemed filed—before August 1. The Government accepted Kirk's factual representation. The Court finds that there is an adequate basis for the determination that Kirk's notice of appeal was timely filed under Rule 4. The record in this case, as supplemented by the finding contained in this Order, shall be returned to the Eleventh Circuit for further proceedings.

SO ORDERED, this 21st day of September, 2005.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

DF/sew